MOHAMED EZAM MOHD NOR & ORS *a*

v.

KETUA POLIS NEGARA

FEDERAL COURT, KUALA LUMPUR *b*
MOHAMED DZAIDDIN CJ
WAN ADNAN ISMAIL CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
SITI NORMA YAAKOB FCJ *c*
[CRIMINAL APPEAL NOS: 05-8-2001(W), 05-9-2001(W),
05-10-2001(W), 05-11-2001(W) & 05-12-2001(W)]
17 OCTOBER 2001
[2001] CLJ JT(6)

CRIMINAL PROCEDURE: *Judge - Objection on ground of bias - Whether judge should recuse himself - Test to be applied - Whether 'real danger of bias' or 'reasonable apprehension of bias' - R v. Gough* *d*

In this appeal against the decision of the learned judge dismissing the appellants' motion for the writ of *habeas corpus*, the issue was whether the learned judge should have recused himself from hearing the case on the basis of a perception of bias on his part in view of the fact that the appellants were being detained for their involvement in demonstrations against the learned judge's conviction and sentence of Dato' Seri Anwar Ibrahim, the former Deputy Prime Minister of Malaysia, on 14 April 1999 (referred to as "Black 14"). *e* *f*

Held:
Per Mohamed Dzaiddin CJ

[1] The test to be applied is the 'real danger of bias' test as enunciated by the House of Lords in *R v. Gough*. Hence, the question here was whether, having regard to the facts and circumstances of the case, there was a real danger of bias on the part of the learned judge when he heard the appellants' application for *habeas corpus*. (p 706 b-c) *g*

[2] On the facts there was no real likelihood of danger, in the sense of a real possibility of bias, on the part of the learned judge when he heard the *habeas corpus* application. It was conceded that the only common factor between the appellants and the "Black 14" judgment delivered by the learned judge was that the appellants were detained by the respondent for organising demonstrations, one of which was *h* *i*

on 14 April 2001. However, such circumstances did not give a real danger of bias on the part of the learned judge. The same conclusion would have been arrived at even if the reasonable apprehension of bias test was applied. (p 706 d-f)

[Appeal on point of recusal dismissed.]

Di dalam rayuan ini terhadap keputusan Hakim Yang Arif menolak usul perayu untuk writ *habeas corpus*, isu yang terbabit adalah sama ada Hakim Yang Arif sepatutnya menarik diri daripada mendengarkan kes berdasarkan tanggapan sikap berat sebelah (perception of bias) dari pihaknya memandangkan fakta bahawa perayu-perayu ditahan kerana penglibatan dalam pertunjukkan perasaan menentang sabitan dan hukuman Dato' Seri Anwar Ibrahim, bekas Timbalan Perdana Menteri Malaysia, oleh Hakim Yang Arif pada 14 April 1999 (dirujuk sebagai "Black 14").

Diputuskan:
Oleh Mohamed Dzaiddin KHN

[1] Ujian yang harus dipakai adalah kemungkinan wujudnya sikap berat sebelah (real danger of bias) sepertimana diumumkan oleh House of Lords dalam *R v. Gough*. Maka, persoalan di sini adalah sama ada memandangkan fakta-fakta dan keadaan kes kemungkinan wujudnya sikap berat sebelah dari Hakim Yang Arif semasa mendengarkan permohonan perayu untuk *habeas corpus*.

[2] Berdasarkan fakta-fakta, tidak ada kemungkinan wujudnya sikap berat sebelah pihak Hakim Yang Arif semasa beliau mendengarkan permohonan *habeas corpus*. Ianya dipersetujui bahawa faktor yang mengaitkan perayu-perayu dan penghakiman "Black 14" yang diputuskan oleh Hakim Yang Arif adalah bahawa perayu-perayu ditahankan oleh responden oleh kerana mengelolakan pertunjukkan perasaan, yang salah satu daripadanya adalah pada 14 April 1999. Walaupun demikian, keadaan begitu tidak memberikan kemungkinan wujudnya sikap berat sebelah Hakim Yang Arif. Konklusi yang sama mungkin tercapai sekiranya ujian kemungkinan sederhana sikap berat sebelah dipakai (reasonable apprehension of bias).

[Rayuan soal menarik diri ditolak.]

Case(s) referred to:
Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Anor [2001] 2 CLJ 253 ***(refd)***
Ebner v. Official Trustee in Bankruptcy [2000] HCA 63 ***(refd)***
Locabail Ltd v. Bayfield Properties [2000] 1 All ER 65 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [1999] 2 CLJ 215 ***(refd)***
R v. Gough [1993] AC 646 ***(foll)***
R v. Papadopoulos (No 2) [1979] 1 NZLR 629 ***(refd)***
Re Pinnochet (No 2) [1999] 1 All ER 577 ***(refd)***
Webb v. The Queen [1994] 68 ALJR 582 ***(not foll)***

For the appellants - Sulaiman Abdullah (Sivarasa Rasiah, Christopher Leong, Malik Imtiaz Sarwar & Moganambal Murugappan); M/s Daim & Gamany
For the respondent - Azahar Mohamed (Yusof Zainal Abidin, Mary Lim Thiam Suan & Tun Abd Majid Tun Hamzah) AG's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Mohamed Dzaiddin CJ:
This is the judgment of the court.

This is an appeal against the decision of Augustine Paul J given on 25 April 2001 dismissing the appellants' motion for the writ of *habeas corpus*.

The appeal is founded on several grounds. However, before us on 15 October 2001, we heard arguments on the first ground, ie, the recusal application and adjourned our decision to today.

The facts leading to the above application are these. At the commencement of the hearing before the learned trial judge, En Sivarasa, one of the counsel for the appellants, urged him to consider whether he should recuse himself from hearing this case. Counsel's application was grounded on the fact that the learned judge was the judge who heard the case involving Dato' Seri Anwar bin Ibrahim, the conviction and sentence of which was handed dawn on 14 April 1999. This is the date that was referred to as "Black 14" in the press statement of the respondent. Counsel said that the conviction and sentence was the subject matter of strong public criticism including the Bar Council. He added that although there was no assertion of actual bias there might be a perception of bias as the facts are in the public domain. In opposing the application Dato' Abdul Gani Patail, Senior Deputy Public Prosecutor, said that the press statement of the respondent did not refer to the judgment of 14 April.

In his grounds of judgment (at p. 601 Appeal Record) the learned judge held as follows:

> ... If I were to dismiss the applications pending hearing would a reasonable person conclude that I am anti-reformasi? There was no response to this question from learned counsel. If the answer to the test is in the affirmative it is appropriate that I recuse myself from hearing the case. Such a perception can be said to be reasonable if, in my judgment of 14 April, I had made unnecessary comments on the reformasi movement. A perusal of the judgment will reveal that there is absolutely no reference whatsoever to the movement in the judgment. In the premises I was satisfied that the application made before me was frivolous, vexatious and an abuse of the process of the Court. Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact it would be a gross dereliction for a judge to disqualify himself when there are no grounds. Accordingly, I dismissed the application.

Before us, Encik Malik Imtiaz submitted that the application to the judge to recuse himself was based on an 'apprehension of bias' (as opposed to actual bias). According to a press statement issued by the respondent on 11 April 2001, the appellants were detained for *inter alia* their involvement in efforts to organise demonstrations aimed at using militant means. Amongst the more significant and imminent demonstrations was (at that time) one referred to as "Black 14" which was to have taken place on 14 April 2001. "Black 14" is the expression used to refer to and commemorate the date of the delivery of the judgment in *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 by the learned judge and the said judgment had been the subject matter of great criticism. In the premises, counsel contended that there was a reasonable apprehension on the part of a fair-minded person that the said judge might not bring an impartial mind to decide the case and as such justice would not be seen to be done. He stated that the court must act impartially and must also be seen to act impartially (*Ebner v. Official Trustee in Bankruptcy* [2000] HCA 63). In any event, there was a real danger of apparent bias.

Encik Malik Imtiaz relied on the decision of the High Court of Australia in *Webb v. The Queen* [1994] 68 ALJR 582 where a juror in a murder trial brought flowers to court and, on impulse, asked a bystander to give them to the murdered person's mother who was present in court. Counsel for the persons accused thereupon asked for a "mistrial" but the trial judge, having identified the juror who apologised for being impulsive, ruled that the trial should proceed after giving the jury a specific direction to

disregard all emotional inclinations and to assess the evidence objectively. The decision of the trial judge was affirmed on appeal: a further appeal was taken to the High Court. By a majority decision, the court held that the appropriate test in Australia is whether the act of the juror gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror will not discharge his task impartially. This is known as the 'alleged bias' test. The majority decision had clearly rejected the English 'real danger' test where the court said that since the last 18 years, it had consistently adhered to the reasonable apprehension test and there is strong reason why they should continue to prefer the reasoning in their own cases to that of the House of Lords (*ibid* at p. 585). It is of interest to note that the New Zealand courts also applied the reasonable suspicion test. See *R v. Papadopoulos (No 2)* [1979] 1 NZLR 629 CA.

In England, the courts applied the 'real danger' of bias test in a criminal case. In *R v. Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicion test. Lord Goff, after examining the authorities in detail, reformulated the real danger test as follows (*ibid* at p. 670):

> [Having] ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was **a real danger of bias** on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration. (emphasis added)

His Lordship also made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors (like *Webb*) or with arbitrators.

In *Re Pinnochet (No 2)* [1999] 1 All ER 577, the House of Lords considered *R v. Gough*. In the course of his judgment the presiding judge, Lord Browne Wilkinson referred to the conflict of judicial opinion as to the correct test to apply when apparent bias is alleged and left open the question whether the test in *R v. Gough* needs to be reviewed.

In *Locabail Ltd v. Bayfield Properties* [2000] 1 All ER 65, the English Court of Appeal applied the *Gough* test and stated that the court must ask itself whether "... in the circumstances of the case ... it appears that there was a real likelihood, in the sense of a real possibility, of bias ...". It further held that in answering this question, the court must take into account the actual facts as disclosed by the evidence and, in particular, what it was that the judge knew at the time the case was being heard.

In Malaysia, this court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65 followed the 'real danger of bias' test in *Gough* as "this will avoid setting aside of judgment upon quite insubstantial grounds and the flimsiest pretexts of bias" (*ibid* at p. 129). See also *Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Anor* [2001] 2 CLJ 253.

Having considered the authorities cited and their reasonings, we would follow *Gough* which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the *habeas corpus* application involving the appellants.

In our view, on the facts submitted by counsel and the reasons given by the learned trial judge in the grounds of judgment (at p. 601 Appeal Record), there is no real likelihood of danger, in the sense of a real possibility, of bias on the part of the learned judge when he heard the *habeas corpus* application. We concede that the only common factor between the appellants and the "Black 14" judgment of the learned judge is that the appellants were detained by the respondent for organising demonstrations one of which was on 14 April 2001 which became the foundation for the "Black 14" allegation of the respondent. However, we do not think such circumstances do give rise to a real danger of bias on the part of the learned judge. Even if we apply the reasonable apprehension of bias test to the circumstances of this case, we would arrive at the same conclusion.

In the result, we would dismiss this ground of appeal. It follows therefore the issue as to whether the matter should be remitted to the High Court for rehearing or be dealt with by the court does not arise.